

**NO. PD-0653-20**

FILED  
COURT OF CRIMINAL APPEALS  
1/5/2021  
DEANA WILLIAMSON, CLERK

**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**RAUL BAHENA**

**APPELLANT**

**VS.**

**THE STATE OF TEXAS**

**APPELLEE**

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**On Petition for Discretionary Review from  
The Fourteenth Court of Appeals  
in No. 14-18-00760-CR Affirming  
The 177<sup>th</sup> Criminal District Court of  
Harris County, Texas, Cause No. 1552218,  
Honorable Leslie Brock Yates, Judge Presiding**

**APPELLANT'S BRIEF ON DISCRETIONARY REVIEW**

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## **IDENTIFICATION OF THE PARTIES**

Pursuant to TEX. R. APP. P. 38.1 (a), the following are interested parties:

Presiding Judge:	Leslie Brock Yates 177 <sup>th</sup> District Court 1201 Franklin Street Houston, Texas 77002
Appellant:	Mr. Raul Bahena Texas Department of Criminal Justice TDCJID# 02217122 Clemens Unit 11034 Hwy. 36 Brazoria, Texas 77422
Attorneys for State:	Mr. Daniel McCrory Harris County District Attorney's Office 1201 Franklin Street Houston, Texas 77002
Attorneys for Appellant:	Ms. Patricia Segura (trial) 1001 W. Loop S., Suite 809 Houston, Texas 77027  Mr. Crespín Michael Linton (appeal) 440 Louisiana Street, Suite 900 Houston, Texas 77002

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## **STATEMENT OF THE CASE**

Sometime between 10:30 p.m. and 11:00 p.m. on May 19, 2017, Appellant robbed Monica Soria at gunpoint as she sat in her boyfriend Dominique Morales' car that was parked in a park across the street from her home. Soria testified that Appellant initially approached the driver's side of Morales' car and requested cigarettes which they did not have. She stated that Appellant returned about 30 seconds later and robbed them at gunpoint. Soria explained that she recognized Appellant as having attended the same Middle School although she admitted that she did not personally know him. Soria testified that she identified Appellant as the robber on May 20, 2017 from viewing a photo array prepared by Harris County Constable Del Toro. Harris County Constable Whiteley testified that Appellant lived with family near the park where Soria and Morales were robbed.

Over Appellant's hearsay objection that the State's witness was not the custodian of records, Harris County Deputy Larry Franks played several recorded inmate telephone calls from the Harris County Jail which Deputy Franks testified were made by Appellant in which Appellant admitted to the armed robbery of Soria. The trial court allowed the recorded inmate telephone calls despite the fact that the State never listed Deputy Franks as a custodian of records witness and despite the fact that even Franks testified that Deputy Pete Galvan, and not him, was the custodian of records who prepared the disc of Appellant's inmate telephone calls for trial.

## **STATEMENT OF THE PROCEDURAL HISTORY**

This Court granted discretionary review on November 18, 2020 and granted an extension of time to file Appellant's Brief until January 4, 2021.

## **GROUND FOR REVIEW**

The Court of Appeals erred in affirming the trial court's admission of a disc of inmate telephone calls over Appellant's objection that the State's witness was not the custodian of records.

## **SUMMARY OF THE ARGUMENT**

The Court of Appeals erred in affirming the trial court's admission of a disc of Appellant's inmate calls from the Harris County Jail because the State's witness was not the custodian of records for the disc of calls and was also not another qualified witness to testify that the disc of calls were business records under Rule 803(6) of the Texas Rules of Evidence.

## **ARGUMENTS AND AUTHORITIES**

The Court of Appeals incorrectly affirmed the trial court's admission of a disc of inmate telephone calls over Appellant's objection that the State's witness was not the custodian of records for the disc of these recorded calls.

The Texas Rules of Evidence defines hearsay as a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.

**Tex. R. Evid. 801(d)** (West 2020) **Rule 802 of the Texas Rules of Evidence** provides that “[h]earsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority.” (West 2020) **Rule 803(6) of the Texas Rules of Evidence** provides that records of a regularly conducted activity are not excluded as hearsay if a custodian or another qualified witness testifies in court or executes an affidavit that complies with Rule 902(10) of the Texas Rules of Evidence to the following: 1) the record was made at or near the time by – or from information transmitted by – someone with knowledge, 2) the record was kept in the course of a regularly conducted business activity, and 3) making the record was a regular

practice of that activity, and 4) the opponent fails to demonstrate that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness.

The Court of Appeals ruled that the Appellant had failed to show that Deputy Franks was not either a custodian of records or not another qualified witness to testify about the recording of Appellant's jail call under Rule 803(6) of the Texas Rules of Evidence.

### **CUSTODIAN OF RECORDS**

First, Deputy Franks was not the custodian of records for either the recordings made by the third party contractor Securus or the copies of the recordings made by Harris County personnel because the State failed to present any evidence that Franks had 1) custody, maintenance authority, or control over the original recordings, 2) access to the original recordings made by Securus, 3) the ability to copy original recordings made by Securus, 4) any knowledge surrounding the copying of Harris County's copy onto the disc presented at trial, or 5) familiarity with how any relevant recordings were kept, accessed, modified, or copied onto discs. In fact, Deputy Franks testified that Harris County Deputy Pete



Galvan was the custodian of records for the disc of Appellant's calls from the Harris County Jail. (R.R. Vol. 4 at 22)

Business records are not admissible if they do not have sufficient indicia of reliability. **Porter v. State**, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979) "It must be determined in each instance whether the particular record is of such trustworthiness as to guarantee the same protection provided by the constitutional rights of confrontation and cross-examination. The particular record and its relationship to the particular case in which it is offered are a part of the circumstances to be considered in determining whether the record has the indispensable fundamental trustworthiness necessary for its admission into evidence." **Porter**, at 746.

Appellant contends that Appellant demonstrated that the method of preparation of the inmate telephone calls was untrustworthy because there was lack of proof that the disc contained Appellant's calls when many of the inmates rent their identification numbers to other inmates for those inmates to make telephone calls from jail and when Deputy Franks admitted that the disc of calls was labeled with the name of an inmate named Elias Ramirez Fernandez instead of Appellant's name. Appellant argues that the disc of calls was fundamentally untrustworthy

when the State's witness admits that he was not the custodian of records and then claimed that the disc contained telephone calls made by Appellant even though the disc was labeled with another inmate's name.

### **ANOTHER QUALIFIED WITNESS**

Second, Appellant contends that Deputy Franks was not "another qualified witness" under Rule 803(6) of the Texas Rules of Evidence because the State failed to present any evidence that Deputy Franks had personal knowledge of the mode of preparation of the disc of inmate telephone calls. In fact, Franks' testimony was limited to the fact that Harris County used the private company named Securus to operate the system that recorded inmate telephone calls. He stated that he only listened to the disc of calls before his appearance in court. Franks never testified that he had any relevant first-hand knowledge concerning the way any recording was kept, accessed, or copied. His testimony was devoid of any fact which permitted the court to presume the strict requirements set forth in Rule 803(6) had been satisfied.

The Court of Appeals ruled that the Appellant failed to preserve error by failing to object that Franks was not an "another qualified

witness” under Rule 803(6) and supported its ruling by citing the opinion of **Melendez v. State**, 194 S.W.3d 641, 644 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2006, pet. ref’d) However, the court in **Melendez** never ruled that the error had not been preserved by failing to object to the witness as not “another qualified witness,” but that the Appellant failed to present evidence to show that the witness was not a qualified witness. In this case, Appellant contends that the record is devoid of any evidence that Franks was qualified to testify to the authenticity of Appellant’s inmate telephone calls. The appellate court also incorrectly ruled that the Appellant’s objection that Deputy Franks was not a custodian of records of the inmate calls was not also a hearsay objection to the disc of the calls. Appellant contends that his objection to Deputy Franks’ testimony as custodian of records was a hearsay objection to the State’s admission of these inmate calls as a business records exception to the hearsay rule. Appellant’s objection shifted the burden of proof to the State to show that the evidence of the inmate calls was admissible as an exception to the hearsay rule as a business record under Rule 803 of the Texas Rules of Evidence. **Ortiz v. State**, 999 S.W.2d 600, 607 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, no pet.)

## HARM ANALYSIS

An appellate court cannot reverse an erroneous admission of hearsay evidence unless the court concludes that the error affected the Appellant's substantial rights. Tex. Rules App. Proc., Rule 44.2(b) An error affects a substantial right when it has a substantial and injurious effect or influence in determining the jury's verdict. **Taylor v. State**, 268 S.W.3d 571. 592 (Tex. Crim. App. 2008)

Appellant contends that the admission of the disc of inmate call affected his substantial right to a fair trial because the State argued that these telephone calls to the jury as the confession of the Appellant to the armed robbery of Soria because the identity of the inmate caller was not supported by trustworthy evidence. This robbery admission from an unknown person effectively corroborated Soria who was the only eyewitness to the crime. Therefore, the admission of the disc affected Appellant's substantial right to a fair trial.

In conclusion, Appellant contends that the appellate court erred in siding with the trial court in allowing the admission of inmate telephone calls by ruling that Deputy Franks could testify as custodian of records for

these telephone calls. Therefore, the Court of Appeals erred in determining that Deputy Franks was a custodian of records or another qualified witness for the admission of the recordings of Appellant's inmate telephone calls.

### **PRAYER FOR RELIEF**

Appellant prays that the decision of the Fourteenth Court of Appeals be reversed, and the cause remanded to that court for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 2,126 words as determined by the Word program used to prepare this document.

/s/ Crespin Michael Linton  
Crespin Michael Linton

### **CERTIFICATE OF SERVICE**

I do hereby certify that on this the 2<sup>nd</sup> day of January 2021, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Harris County, Texas, 1201 Franklin, Suite 600 Houston, TX 77002 at [mccrory\\_daniel@dao.hctx.net](mailto:mccrory_daniel@dao.hctx.net) and the State Prosecuting Attorney, P.O. Box 12405 Austin, Texas 78711 at [information@spa.texas.gov](mailto:information@spa.texas.gov).

/s/ Crespin Michael Linton  
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